No. 88-1170 (2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

BOISE-KUNA IRRIGATION DISTRICT,
NAMPA & MERIDIAN IRRIGATION DISTRICT,
NEW YORK IRRIGATION DISTRICT,
WILDER IRRIGATION DISTRICT,
BIG BEND IRRIGATION DISTRICT
AND WEISER IRRIGATION DISTRICT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,
AND THE TWIN FALLS CANAL CO.
AND NORTH SIDE CANAL CO.
AND STATE OF IDAHO,

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF FOR THE STATE OF IDAHO IN OPPOSITION

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QUESTIONS PRESENTED

Does the McCarran Amendment, 43 U.S.C. § 666, require the inclusion of all water right claimants upstream from the terminus point of a state court general adjudication of water rights in order to obtain jurisdiction over the United States in that state court proceeding?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 5
ARGUMENT 5
CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Dugan v. Rank, 372 U.S. 609 (1963) 8

Farmers' Co-operative Ditch Co. v. Riverside Irrigation District Limited, Canyon County Civil Case No. 1323X, *aff'd*, 14 Idaho 450, 94 P. 761 (1908), *aff'd in part, rev'd in part*, 16 Idaho 525, 102 P. 481 (1909) 3

Idaho Power Co. v. State, 104 Idaho 575, 661 P. 2d 741 (1983) 6

Muir v. Allison, Washington County Civil Case Nos. 823 and 1370, *rev'd and remanded*, 33 Idaho 146, 191 P. 206 (1920) 4

Pioneer Irrigation District v. American Ditch Association, Canyon County Civil Case No. 5301½, *aff'd in part and rev'd in part*, 50 Idaho 732, 1 P. 2d 196 (1931) 4

United States v. District Court in and for the County of Eagle, 169 Colo. 555, 458 P. 2d 760 (1969), *aff'd* 401 U.S. 520 (1971) 10

United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) 8

United States v. District Court in and for Water Division No. 5, 401 U.S. 527 (1971) 9

STATUTES

43 U.S.C. § 666 ..... 2, 6

Idaho Code § 42-227 8

Idaho Code § 42-1406 10

Idaho Code § 42-1406A 6, 7

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OPINIONS BELOW

The opinions below are fully set forth in the petition for a writ of certiorari.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on October 13, 1988 affirming the decision of the district court requiring the inclusion of four previously adjudicated tributaries of the Snake River in the Snake River Basin adjudication. Pet. at 5, 8a.[1] Although the district court relied on both state law and federal law to support its decision, the Idaho Supreme Court rejected the state law basis and determined that the McCarran Amendment, 43 U.S.C. § 666, requires the inclusion of all water right claimants upstream from the terminus point of a state court general adjudication of water rights in order to obtain jurisdiction over the United States in the state court proceeding.

STATUTES INVOLVED

The statutes involved are set forth fully in the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners did not set forth the status of the adjudications in the Boise and Weiser River subbasins in their statement of the case. An understanding of the old adjudications in those two subbasins is critical to the Idaho

[1] The phrase "four adjudicated tributaries refers to the Boise, Lemhi, Payette, and Weiser Rivers. 764 P. 2d at 81. Pet. at 8a. Although other adjudicated tributaries exist in the Snake River Basin, Idaho Code § 42-1406A does not apply to them.

Supreme Court's judgment. Thus, the respondents supplement the statement of the case in the petition for certiorari by providing that explanation.

i. The Boise River.

The Boise River Basin encompases an area beginning on the western edge of the Sawtooth Range in the Trinity Mountains near central Idaho, extending south to the Mountain Home Desert and west to the Snake River near Nyssa, Oregon. Exhibit 180.

The water rights delivered by the Boise River watermaster within Water District 63 are all downstream of Lucky Peak Reservoir with the exception of storage from federally controlled facilities at and above Lucky Peak Dam. Exhibits 1004, 1005. Those water rights which are delivered arise from a number of court decrees. The two most important decrees are the Stewart and Bryan decrees discussed below.

The Seventh Judicial district court for Canyon County entered on January 20, 1906, its water rights adjudication decree in *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District Limited,* Canyon County Civil Case No. 1323X, *aff'd* 14 Idaho 450, 94 P. 761 (1908); *aff'd in part, rev'd in part,* 16 Idaho 525, 102 P. 481 (1909) (Stewart Decree). The Stewart Decree lists approximately 133 water rights of approximately 200 named parties. The United States was not a party to this adjudication. This decree did not adjudicate rights to the use of ground water.

The Seventh Judicial district court for Canyon County entered on February 16, 1929 its water rights adjudication decree in *Pioneer Irrigation District v. American Ditch Association,* Canyon County Civil Case No. 5301½, *aff'd in part, rev'd in part;* 50 Idaho 732, 1 P. 2d 196 (1931) (Bryan Decree). The Bryan Decree adjudicated the rights to the use of surface waters among over 100 named corporate and individual defendants. The United States filed a "Complaint in Intervention of United States of America" on November 2, 1915, and a "Supplemental Complaint in Intervention of United States of America" on March 7, 1927. Exhibits 40, 41.

The Idaho Supreme Court's opinion in *Pioneer Irrigation District* reversed the Bryan Decree regarding the determination of those rights of the United States then before the court. 50 Idaho at 752. There is no evidence in the record to show that the state district court ever resolved the issues concerning the United States claims on remand.

ii. The Weiser River.

The Seventh Judicial district court for Washington County entered its water rights adjudication decree on June 21, 1921, in *Muir v. Allison,* Washington County Civil Nos. 823 and 1370, *rev'd and remanded,* 33 Idaho 146, 191 P. 206 (1920). This decree adjudicated approximately 496 rights of 920 named parties. The United States was not a party to this adjudication. The decree did not include ground water.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because the Idaho Supreme Court correctly applied past decisions of this Court to include two subbasins within the Snake River Basin general adjudication of water rights. In addition, the practical effect of denying the petition is to include two subbasins within the Snake River Basin general adjudication and to incorporate some old decrees into a comprehensive decree adjudicating all rights to the use of water within the Snake River Basin.

ARGUMENT

I

THIS CASE DOES NOT PRESENT THE SPECIAL AND IMPORTANT REASONS WARRANTING REVIEW BY THIS COURT

The petitioners argue that this case "violates the precedents of this Court and other courts, [and that] it will also cause irreparable harm to the states' administration of their water resources." Pet. at 22. The Idaho Supreme Court judgment does neither; therefore, the respondent opposes the petition for a writ of certiorari.

Fundamentally, this action arises out of the Swan Falls water rights dispute between the Idaho Power Company and the respondent.[2] This dispute concerned "conflicting claims to utilization of the waters of the Snake

[2] The Swan Falls water rights dispute acquired its name from the Swan Falls Dam and Hydroelectric Facility owned by Idaho Power Company that was the focus of the dispute.

River between competing interests of power generation and agricultural irrigation." *Idaho Power Co. v. State*, 104 Idaho 575, 578, 661 P. 2d 741, 744 (1983). After seven years of litigation the Idaho Power Co. and respondent entered into a settlement agreement dated October 25, 1984. Exhibit 179. The settlement agreement proposed a new management approach for the Snake River Basin. It increased required minimum stream flows; it subordinated Idaho Power Company's hydropower water rights in excess of those minimum flows; and it proposed legislation to provide the information necessary to manage the Snake River in accordance with the settlement agreement.

A part of the proposed legislative program was a bill requiring a general adjudication of rights to the use of water in the Snake River Basin. Exhibit 179. This bill was approved as Idaho Code § 42-1406A. The statute makes clear the legislative desire for a general adjudication that would result in a determination of federal and state water rights. The statute also has a unique provision, however, to accommodate the desire of some local water users to be left out of the general adjudication. The focal point of the present dispute is this latter provision of Idaho Code § 42-1406A.

Idaho Code § 42-1406A(3)(b) states, in part, that "[t]he director shall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other party whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran Amendment, 43 U.S.C.

§ 666." The interpretation of this reference to the McCarran Amendment was the subject of much dispute in the courts below.

The respondent argued that the Legislature intended Idaho Code § 42-1406A(3)(b) merely to require the determination of whether the United States in fact refuses to consent to the exclusion of the four adjudicated tributaries. If so, the respondent argued that as a matter of state law the four adjudicated tributaries must be included. Although the district court agreed with this argument, the Idaho Supreme Court rejected the argument on the basis that it would constitute an improper delegation of legislative authority. The court instead interpreted Idaho Code § 42-1406A(3)(b) to require compliance with the McCarran Amendment. The court concluded that federal law required the inclusion of the Boise and Weiser River subbasins in the general adjudication.[3] Absent the problem of improper delegation of legislative authority, this case would not have presented a federal law issue for review by this court.

The petitioners argue that the Idaho Supreme Court incorrectly imposed a geographic limitation on the discretion of states to set the boundaries of a general adjudication. Pet. at 14-15. The Idaho Supreme Court's decision does not rest on some novel analysis of geography as

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[3] Parties from the Lemhi and Payette River Basins did not appeal the inclusion of those basins within the general adjudication. Water users from the Boise and Weiser River Basins are the only parties who appealed from the state district court judgment. Thus, the inclusion of the Boise and Weiser River basins is the only issue before this Court.

suggested by petitioners. Rather, its decision is a direct implementation of past decisions of this Court.

The Idaho Supreme Court explained its rationale for including the Boise and Weiser River subbasins in the adjudication in the following statement: "The record demonstrates that none of these adjudicated tributaries [referring to the Boise and Weiser Rivers, among others] have been fully adjudicated as to all water rights of the United States pursuant to the McCarran Amendment." 764 P.2d at 81, Pet. at 8a-9a. The court then applied this Court's decision in *Dugan v. Rank*, 372 U.S. 609 (1963), to require the inclusion of the Boise and Weiser River subbasins in the adjudication, 764 P.2d 85, Pet. at 17a-18a.[4]

The court then explained why the petitioners' reliance on two decisions concerning the Colorado adjudication procedure was misplaced. *United States v. District Court in and for the County of Eagle*, 401 U.S. 520

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[4] The United States asserted that this Court's past decisions require all water users upstream from the terminus point of an adjudication to be included in the general adjudication. Although the respondent has not contested this assertion in this proceeding, the respondent does not agree with it. The respondent's interpretation is that the McCarran Amendment only requires inclusion of those persons who possess federal reserved water rights or who are required by state law to obtain a state water right through a permit/license system. The distinction is illustrated by reference to state law. Idaho state law does not require a person who constructs a well for domestic use to obtain a state water right permit/license. Idaho Code § 42-227. The decision to omit domestic use from ground water from the required state permit/license system reflects a judgment that such uses are so small as not to require administration by a watermaster. The United States assertion would require such persons to be made parties; the respondent's interpretation would not.

(1971) and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). The court stated:

> While it is true that the United States Supreme Court agreed with the Colorado Supreme Court that the Eagle River, a tributary of the Colorado River, could be adjudicated under the McCarran Amendment, even though other parts of the Colorado River system within Colorado were not adjudicated in the same proceeding, this decision must be read in light of the unique system of water adjudication that exists in Colorado. In *United States v. District Court, Water Division No. 5, Colorado,* the Supreme Court clarified why the adjudication by district or division under the unique Colorado system qualified as a "general adjudication" under the McCarran Amendment:
>
> > The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; . . . .
>
> 401 U.S. at 530, 91 S. Ct. at 1005.
>
> Even though the Gunnison River was excluded from the adjudication in water division 5, it was included in the adjudication of water division 4. Colo. Rev. Stat. Annot. § 37-92-201(1)(d) (1973). Thus, the Gunnison River was adjudicated under the McCarran Amendment as part of Colorado's unique system of determining water rights. When read in the context of the system of adjudication in Colorado, neither *Eagle County* nor *Water Division No. 5* would support the exclusion of the Boise River or the Weiser River from this adjudication.

764 P.2d at 86, Pet. at 19a-20a. The above analysis is a correct application of this Court's prior precedent and does not warrant review by this Court.

Colorado statutory procedures provide for another ongoing adjudication proceeding with coordination between the resulting decrees. *United States v. District*

Court in and for the County of Eagle, 169 Colo. 555, 570, 458 P. 2d 760, 767 (1969) *aff'd* 401 U.S. 520 (1971). Unlike Colorado, Idaho law does not provide an ongoing, coordinated adjudication proceeding. The Idaho Supreme Court concluded that the decrees on the Boise and Weiser River subbasins were not fully adjudicated. 764 P.2d at 81, Pet. at 8a-9a. Idaho law does not provide any assurance that those old decrees will be made comprehensive.[5] Thus, there is no assurance that all rights within the Snake River basin will ultimately be adjudicated. For those reasons the Idaho Supreme Court was correct in concluding that the decisions of this Court regarding the Colorado procedure do not support the exclusion of the Boise and Weiser River subbasins.

The petitioners also argued that the Idaho Supreme Court's judgment causes irreparable harm to state administration. The petitioners explain their concern as follows:

> For example, it would mean that Washington and Oregon, in order to adjudicate a portion of the Columbia River, would have to adjudicate the entire Columbia River system within their states. For Montana to have a general adjudication of a portion of the Missouri River, it would have to adjudicate the entire Missouri River and its tributaries within the state. For Colorado, Utah or Arizona to adjudicate a portion of the Colorado River, they would have to

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[5] Idaho Code § 42-1406 authorizes the director of the Idaho Department of Water Resources to petition a state district court for an order commencing a general adjudication at any time upon a finding of public interest and necessity. However, this section does not require the commencement of a general adjudication of each river basin.

> adjudicate the entire Colorado River and all its tributaries within their states. Moreover, on the many smaller river systems in the western states, it could mean that the states would have no discretion to adjudicate portions of a river, such as the upper half or the lower half. The decision of the Idaho Supreme Court is thus of national importance and deserves consideration by this Court.

Pet. at 23-24. This argument overstates the court's rationale in this case and the practical result of the court's opinion.

The respondent's original petition in this case only requested an adjudication of the Snake River Basin upstream from and including the Salmon River basin. R. Vol. I, pp. 4 *et seq.* *See* Pet. at 61a. The state district court concluded that the McCarran Amendment required the inclusion of the lower Snake River basin in the state of Idaho downstream from the confluence of the Salmon River. Pet. at 49a. However, no party challenged this addition to the geographic scope of the adjudication in proceedings before the Idaho Supreme Court. Thus, the issue of whether an entire basin within one state must be included in one general adjudication was not before the court. Any statements by the Idaho Supreme Court to that effect are dicta.[6]

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[6] The Idaho Supreme Court made the following statement: "The McCarran Amendment requires the adjudication of all those who use water of a river system within a state, including those who use the water of tributaries." 764 P. 2d at 86. This statement is dicta to the extent it concludes the entire Snake River Basin within the state must be included within one general adjudication proceeding for purposes of the McCarran Amendment.

The practical effect of the Idaho Supreme Court's judgment is to include two subbasins within the Snake River Basin general adjudication and to incorporate these old decrees into a comprehensive decree adjudicating all rights to the use of water within the Snake River Basin. This will result in better administration of the entire Snake River Basin.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 9th day of February, 1989.

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